No. 89-943 (3)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THOMAS J. KLINE, INC.,

Petitioner,

v.

LORILLARD, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Franklin Poul
Counsel of Record
Debra Klebanoff
Dana B. Klinges
WOLF, BLOCK, SCHORR and SOLIS-COHEN
15th & Chestnut Streets
Twelfth Floor Packard Building
Philadelphia, PA 19102
(215) 977-2000

Fenton L. Martin
WHITEFORD, TAYLOR & PRESTON
Suite 1400 Union Trust Tower
7 Saint Paul Street
Baltimore, MD 21202

Counsel for Respondent,
Lorillard, Inc.

The Winchell Company
1315 Cherry Street · Philadelphia, PA 19107
(215) 496-3664

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Lorillard, Inc.[1] ("Lorillard"), respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 878 F.2d 791.

QUESTIONS PRESENTED

1. Whether a decision of the Lorillard credit department to require petitioner to post a letter of credit amounted to price discrimination in violation of the Robinson-Patman Act.

2. Whether petitioner's claim of a requirements contract to sell on credit was sufficiently supported, to satisfy the Statute of Frauds, by a letter which simply authorized petitioner to purchase on a direct basis and set out Lorillard's current prices and payment terms.

1. Lorillard, Inc. is a wholly owned subsidiary of Loews Corporation. P. Lorillard International, S.A. is a subsidiary of Lorillard, Inc. Loew's Lorillard International Services, S.A. and Lorillard Italy, S.P.A. are subsidiaries of Lorillard, Inc. in the process of dissolution.

STATEMENT OF THE CASE

Petitioner is a corporation controlled by its namesake, Thomas J. Kline ("Kline"). From 1977 to 1980 Kline controlled Wm. B. Merrey & Sons, Inc. ("Merrey"), an Elkton, Maryland tobacco distributor. In 1980 he sold Merrey to M. Paolella & Sons, Inc. ("Paolella"), a Philadelphia tobacco distributor, managed it for Paolella, and then repurchased the business through petitioner in December 1985.

When Merrey was acquired by Paolella, it was operating under credit limitations imposed by the Lorillard credit department because of late payment problems, and related issues. Under the aegis of Paolella, payments for Lorillard products shipped to Merrey were handled directly by Paolella.

At the end of January 1986, about a month after Kline's reacquisition of the Merrey business, Paolella closed down and went into bankruptcy, causing substantial losses to its cigarette suppliers, including Lorillard. These losses were in major part attributable to the assertion of liens by Maryland National Industrial Finance Corporation ("MNIF"), which had financed Paolella, and which also financed both the asset purchase and subsequent operations of petitioner, with similar all embracing first liens on the inventory and other assets of petitioner.

At the outset of petitioner's business in the latter part of December 1985, the Lorillard credit department approved credit for petitioner up to a limit of $30,000, even though the only available financial statement was a "pro forma," and petitioner acknowledged a thin capitalization. It was expected that each shipment would be paid for within 15 days in order to gain the benefit of a 3.25% discount.

Shortly after the Paolella bankruptcy, and after Lorillard's discovery of a transshipment of inventory from a Paolella affiliate to petitioner, petitioner submitted an unusually large $30,000 order. This order was inconsistent with its original business plan, and with its prior ordering practice, and would have raised petitioner's indebtedness from $38,000 to $68,000. Lorillard's credit department

reacted by insisting on a letter of credit to back up any future credit, and a $60,000 letter of credit was then supplied by MNIF.[2]

There was no evidence that this reflected anything but a *bona fide* credit decision on the part of Lorillard's credit department.

On March 31, 1986, this action was commenced, based primarily on a claimed contract to grant credit, in the Circuit Court of Maryland for Cecil County, and a temporary restraining order was entered followed by a preliminary injunction, which in net effect compelled Lorillard to extend credit up to $120,000 with only a $60,000 letter of credit. After removal of the action to the District Court for the District of Maryland, petitioner added the charge that the denial of credit amounted to price discrimination in violation of the Robinson-Patman Act.

The only documentation of the alleged contractual obligation of Lorillard to petitioner was a letter of January 15, 1986:

"Dear Mr. Kline

We are pleased to inform you that your request to purchase Lorillard products on a direct basis has been approved by our New Accounts Committee, and you have been added to our direct list of customers for Full Line as successor to W.B. Merrey & Sons, Inc.

Our terms are:

REGULAR TERMS:	2% cash discount on invoices if payment is mailed no later than the 15th day after invoice date.
ANTICIPATORY DISCOUNT:	1.25% cash discount (total discount 3.25%) is available if payment is RECEIVED at our remittance address no later than the 15th day after invoice date.

2. An original demand for cash payments was promptly modified into a letter of credit arrangement. For about a month a problem in transmission of the letter of credit resulted in payment by wire transfers, through MNIF.

Enclosed is our price list No. 61, dated July 22, 1985 with supplements."

Kline testified in conclusory fashion, based on his "experience in the industry and . . . prior dealings with Lorillard," that he was entitled to purchase all of his requirements on 15 day terms. The only foundation for this was his assertion that Lorillard and the other cigarette manufacturers had always sold him all he ordered, on credit. Aside from the *non sequitur* of inferring a requirements contract from a vendor's past willingness to sell on credit, the assertion turned out to be untrue.[3]

The antitrust discrimination claim was based on the testimony of Lilly Ann Gordon, an "expert" who had no experience in the credit management field.

She compared petitioner's credit file with those of some other companies, notably Park Jensen, and concluded that petitioner was equally worthy of credit. In doing so, she made nothing of the inconsistency between the pro forma statement and the size of petitioner's order, treated petitioner's predictive pro forma as the equivalent of Park Jensen's audited statements, and ignored Kline's troubling connection with Paolella. She simply brushed aside the fact that Park Jensen also was required to post a letter of credit. The factual matrix of Lorillard's credit decision is discussed by the Court of Appeals at App. 15a-16a, and largely ignored in the petition.

The interest cost to petitioner of cash payment to Lorillard for one month was about $500, and the cost of maintaining a $60,000 letter of credit thereafter was about $190 per month. Ms. Gordon and an accountant, as experts, supported a theory of lost profits in an amount of $1,526,733 based on a series of extrapolations from inflated earnings

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3. The corporate petitioner, having been formed for the reacquisition of the Merrey business, had no credit history of its own. Kline as the owner of Merrey had been, as noted, subjected to special credit limits by Lorillard before he sold Merrey to Paolella. And other tobacco companies were also, independently, limiting credit to petitioner.

in February 1986, when petitioner was filling the orders that had been placed with the defunct Paolella.

The jury then awarded a judgment of $1,000,000 on the contract claim and $526,733 on the antitrust claim. This was obviously self-contradictory since the damage claim was the same for both causes of action. The District Court dealt with this problem by treating the $1,000,000 as a compensatory award and doubling the antitrust award as "punitive," thus entering a total final judgment of $2,053,466 plus interest, attorneys' fees and costs.[4]

The Fourth Circuit Panel, comprised of Judges Winter, Sprouse and Chapman, reversed the decision of the District Court. The Court of Appeals held that petitioner's expert did not possess the minimum qualifications necessary to support her opinions regarding a Robinson-Patman violation, and that no authority existed for the claim of a Robinson-Patman violation on the facts presented. The Court held further that the contract claim was barred by the Maryland Statute of Frauds.

In a dissenting opinion, Judge Sprouse disputed the majority's reversal but would have remanded because the damage calculation on both the contract and antitrust claims was insufficiently supported by the evidence, an issue not reached by the majority.

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4. The District Court also issued an order permanently enjoining and restraining Lorillard from unlawfully discriminating in price, including credit terms, against petitioner in any manner prohibited by the Robinson-Patman Act. The petition (p.8) goes beyond the record to assert that "Kline's business failed following vacation of the permanent injunction." The *propter hoc* implication is indefensible. Petitioner closed down before there was any modification of Lorillard credit arrangements. Petitioner did not pay its debt to Lorillard, and Lorillard suffered a loss which was modest only because the letter of credit permitted by the original injunction remained as a buffer.

REASONS FOR DENYING THE WRIT

1. The Fourth Circuit Applied The Proper Standard — The Same Standard Applied By The Other Courts of Appeal — In Holding That The Refusal To Extend Credit Was Not A Violation Of The Robinson-Patman Act

The Fourth Circuit's decision on the Robinson-Patman claim, far from creating a conflict among the circuits or departure from Supreme Court precedent, aligns squarely with existing case law. Prior to this case, only the Sixth and Tenth Circuits had considered whether a determination as to credit worthiness can constitute a violation of the Robinson-Patman Act.[5] *See Bouldis v. United States Suzuki Motor Corp.*, 711 F.2d 1319 (6th Cir. 1983); *Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976). Both courts reached the same conclusion: A legitimate credit decision is not actionable under the antitrust laws. *See Bouldis*, 711 F.2d at 1325; *Craig*, 515 F.2d at 224. A host of lower courts agrees.[6]

The Fourth Circuit expressly adopted the reasoning of the Sixth and Tenth Circuits, finding as they did that " 'differences in the borrower's financial strength, business experience, and many other factors bring about differences in the terms of credit.' " App. 11a, citing *Craig*, 515 F.2d at 224. In other words, decisions as to credit worthiness are bound to create differences in that some borrowers will fail

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5. The Ninth Circuit noted the Tenth Circuit's holding but did not decide whether it applied. *See Foremost Pro Color, Inc. v. Eastmak Kodak Co.*, 703 F.2d 534, 537 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984).

6. *See, e.g., General United Co. v. American Honda Motor Co.*, 618 F. Supp. 1452, 1455-56 (W.D.N.C. 1985); *L.S. Amster & Co. v. McNeil Laboratories, Inc.*, 504 F. Supp 617, 620-22 (S.D.N.Y. 1980); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 502 F. Supp. 637, 647-48 (D.N.J. 1980); *Petroleum for Contractors, Inc. v. Mobil Oil Corp.*, 493 F. Supp. 320, 326-28 (S.D.N.Y. 1980); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F. Supp. 110, 122 (E.D.N.Y. 1976); *Lang's Bowlarama, Inc. v. AMF Inc.*, 377 F. Supp. 405, 408-09 (D.R.I. 1974).

to meet the lender's standards, but that is not the price discrimination which the Robinson-Patman Act was designed to prevent.

None of the circuits — including the Fourth — has gone so far as to suggest that there can not be a factual situation so egregious that it raises the possibility of price discrimination. The *Craig* court warned: "We do not say that there could not be a discrimination in credit of such magnitude or nature as to constitute a violation, but no such extreme situation was alleged here by any means." 515 F.2d at 224. The Fourth Circuit adopted this approach in full, *see* App. 15a, but found nothing in the facts of this case to warrant submitting the issue to a jury, *see id.*

In the face of this seamless consistency in the caselaw, petitioner has tried to manufacture a conflict out of thin air in order to capture this Court's attention. Petitioner claims, for instance, that the Fourth Circuit's ruling contradicts Supreme Court precedent, citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). That case, however, did not involve a price discrimination claim under the Robinson-Patman Act; nor did it involve an individual credit decision. In *Catalano,* beer distributors had conspired to discontinue allowing short term credit to their retailers across the board. The arrangement had nothing to do with individual credit criteria; in fact, the beer distributors' action was a thinly disguised price increase. This Court found defendants' conspiracy to be a classic horizontal agreement to fix prices and thus a *per se* violation of the Sherman Act, Section 1. *See* 446 U.S. at 648.

Lorillard does not dispute the point made by *Catalano* — that the extension or denial of credit can have an effect on cost. It is a remarkable leap of logic, however, from that obvious concept to the position urged by Kline — that a seller may not deny credit to any customer based on concerns about that customer's credit worthiness, so long as it continues to extend credit to other customers. Under Kline's proposed scenario, a seller would be forced in doubtful situations to reduce every customer's credit to maintain a specious uniformity, or to take unwarranted risks in

extending credit. Otherwise, its decisions would always be subject to second-guessing by an expert witness or jury. These results could hardly have been anticipated by the draftsmen of the Robinson-Patman Act[7] — and they are certainly not demanded by this Court's holding in *Catalano*.

Petitioner also claims that the Fourth Circuit has applied a different burden of proof than did the Sixth Circuit in *Bouldis*. Pet. at 12-13 & n.11. Yet the *Bouldis* court did not specify one way or another which party bears the burden of proof; it simply noted in approving summary judgment that the record reflected legitimate reasons for the credit decision in question, while plaintiff had "failed to submit any probative evidence which would suggest that [defendant's] credit decisions were based upon any other factors or motive." 711 F.2d at 1326. This was precisely the conclusion reached by the Fourth Circuit in finding that the Robinson-Patman claim should not have gone to a jury.

Finally, petitioner points to a twenty-year-old decision of the Federal Trade Commission, claiming that it stands for the proposition that "credit discrimination is a discrimination in price." Pet. at 11, citing *Viviano Macaroni Co.*, [1967-70 Transfer Binder] Trade Reg. Rep. (CCH) ¶18,246 (1968), *aff'd*, 411 F.2d 255 (3d Cir. 1969). In *Viviano*, defendant offered a preferred customer a "package" consisting of free merchandise, freight allowances and extended credit terms. The extension of credit was wholly unrelated to any determination of credit worthiness. Instead, it was designed, along with the rest of the package, to induce the customer to carry more of defendant's products. The discrimination was obvious, and had nothing to do with evaluation of credit *risk*.[8]

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7. The statute deals expressly with other collateral terms affecting net cost such as advertising allowances. *See* 15 U.S.C. §§ 13(c), 13(d), 13(e), 13a.

8. The Third Circuit, in affirming, did not discuss this issue in any detail.

Notwithstanding petitioner's claims to the contrary, there is no conflict for this Court to resolve. Each circuit applies the same standard, and that standard is a proper one. That being so, granting certiorari on the Robinson-Patman claim would lead to nothing more than a review of the particular facts of this case to determine whether the Fourth Circuit properly applied the standard it articulated — an exercise that would do nothing to further the development of antitrust law.

In any event, the Fourth Circuit's application of the standard was correct. The record was replete with evidence of Lorillard's legitimate reasons for demanding a letter of credit from petitioner — evidence such as petitioner's connections to the Paolella bankruptcy, the transshipment of inventory to petitioner from a Paolella affiliate, the lack of any audited financial statements, petitioner's thin capitalization, and the abrupt increase in volume, and therefore in risk. In contrast, petitioner presented *no* evidence that Lorillard's demand for a letter of credit was based on anything but a genuine concern about petitioner's credit worthiness. Instead the petition (page 8) offers the astounding assertion that Lorillard need not be concerned about credit worthiness because it can spread the risk of default by "factoring the cost into its pricing structure."

2. The Other Issues Raised Are Not Appropriate To A Petition For Certiorari

A. The Expert Witness

The Court of Appeals articulated the most liberal standard possible for the admissibility of expert testimony, *see* App. 17a-18a, and simply found that the testimony tendered here did not measure up.

The substantive question was whether Lorillard had made a *bona fide* credit decision. The expert had no experience with respect to credit decisions. The most she could offer was the ability to read a financial statement. The nature of her testimony confirmed the inadequacy of her experience, since it conspicuously ignored the very things that would be important to a credit department. In any

event no reason has been suggested for reanalysis by this Court of her credentials and assertions.

B. Statute of Frauds

Petitioner sought to turn an expression of willingness to sell a "full line" on a "direct basis" into a long term requirements contract. The Court of Appeals interpreted Maryland law as barring such an effort under the Statute of Frauds, since there was no language in the writing relating to quantity. The decision is firmly based on the Maryland precedents, and petitioner points to no real conflict with any reported decision of any kind. The opinion accepts the general rule that parol evidence can be used to add precision to a generally stated quantity term, but not to create a contract where the quantity term expressly required by the Statute is totally omitted. Petitioner does not challenge this rule but asks this Court to decide that references to a "full line" and "direct basis" are a sufficient foundation for parol evidence as to quantity. This is far-fetched on the merits and incomprehensible as a ground for certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Franklin Poul
Debra Klebanoff
Dana B. Klinges
WOLF, BLOCK, SCHORR and
SOLIS-COHEN
Twelfth Floor Packard Building
Philadelphia, PA 19102
(215) 977-2000

Fenton L. Martin
WHITEFORD, TAYLOR &
PRESTON
Suite 1400 Union Trust Tower
7 Saint Paul Street
Baltimore, MD 21202

Attorneys for Respondent
Lorillard, Inc.

CERTIFICATE OF SERVICE

I, Franklin Poul, counsel for respondent, certify that at the time of filing with the Clerk, three copies of the foregoing Respondent's Brief in Opposition were served by first class mail, postage prepaid, upon counsel for petitioner at the following address:

Louis Burton Price, Esquire
Brocato, Price & Bushel, P.A.
1402 Fidelity Building
210 N. Charles Street, No. 1402
Baltimore, MD 21201

_____

Franklin Poul